No. 88-124

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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LYNN L. BREININGER, PETITIONER

*v.*

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6

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*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

1. Whether the National Labor Relations Act preempts federal court jurisdiction over a union member's claims that his union breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act by discriminating against him in job referrals.

2. Whether a union's alleged refusal to refer a member to jobs, as a result of his political opposition to the union's leadership, gives rise to a cause of action under Sections 101(a)(5), 102, and 609 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5), 412, and 529.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

This case raises two questions in which the United States has an interest:

The first is whether the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, preempts federal court jurisdiction over claims that a union has breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act by discriminating against a union member in the administration of a job referral system. The NLRA empowers the National Labor Relations Board (NLRB or Board) to adjudicate unfair labor practice claims arising under Sections 7 and 8 of the Act, 29 U.S.C. 157, 158. Recognizing that the Board has primary responsibility for the interpretation and administration of that Act, this Court has held, subject to certain exceptions, that courts may not entertain claims based on activities arguably subject to Section 7 or Section

8 of the Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Board has a strong interest in cases, like this one, that address the extent of its exclusive jurisdiction under the *Garmon* rule and that rule's exceptions.

This case also presents the question whether alleged discrimination against a union member by a union in the operation of a job referral system, in retaliation for the member's intra-union political activity, can give rise to a cause of action under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401 *et seq.* (LMRDA). As this Court has observed, the Act's "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan* v. *Leu*, 456 U.S. 431, 441 (1982). The means Congress chose to further that objective included, in Title I of the Act, conferring certain rights on union members and providing a private right of action for violations of those rights and, in Title IV of the Act, establishing requirements for elections that are enforced by the Department of Labor. The provisions of the Act enforceable by the Department and those enforceable by union members complement one another in assuring that unions are democratically governed. Accordingly, the United States has an important interest in the interpretation of provisions of the Act, like those in issue in this case, that establish the rights of union members to participate freely in intra-union political activity.

In connection with the Court's consideration of the petition for a writ of certiorari, the Solicitor General was invited to and did file a brief expressing the views of the United States.

## STATEMENT

1. Respondent Sheet Metal Workers Local Union No. 6 (the Union) represents sheet metal workers in a multi-



employer bargaining unit in the Toledo, Ohio, area. The Union has agreed in a collective agreement with two associations of employers to establish and administer a job referral system.[1] Under that system, when an employer asks the Union to provide particular individuals to work on a job, the Union attempts to honor the request (Pet. App. A6). However, if the employer does not request particular individuals or if the individuals requested are unavailable, the Union refers workers from an "out-of-work list" (*id.* at A5-A6). A sheet metal worker is not required to seek work exclusively through the out-of-work list, but rather may solicit employment directly from sheet metal contractors (*id.* at A5).

In this action, petitioner Breininger, a member of the Union, has alleged that the Union has refused to honor employer requests for his services and has unjustifiably passed him over in making referrals from the out-of-work list. Pet. App. A18-A20. According to the amended complaint, this alleged mistreatment gives rise to claims based on the Union's "duty of fair representation" (Pet. App. A18-A20) and on Sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. 411(a)(5) and 529 (Pet. App. A21).

2. The district court granted summary judgment in favor of the Union, holding that all of petitioner's claims were within the exclusive jurisdiction of the NLRB. Pet.

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[1] Article V of the collective bargaining agreement provides in pertinent part (Pet. App. A5):

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. • • •

If the Union does not provide enough workers within 48 hours, an employer may fill the positions itself.

App. A4-A10. Invoking the general rule of preemption set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the district court concluded that "[t]he NLRB has exclusive jurisdiction over discrimination in hiring hall referrals." Pet. App. A9.

3. In a brief *per curiam* opinion, the court of appeals affirmed (Pet. App. A1-A3). That court concluded that "union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB" (Pet. App. A2). The court added that it was "of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights" (*ibid.*) and that petitioner could not prevail on his fair representation claim in any event because he had failed "to affirmatively allege that his *employer* breached the collective bargaining agreement" (*ibid.*).

The court of appeals also ruled that petitioner's LMRDA claim was insufficient on the merits, because petitioner did not demonstrate that he was improperly "disciplined" within the meaning of that Act (Pet. App. A3). Relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), the court stated that the LMRDA was "intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment." Pet. App. A3. Under the system at issue in this case, the court found, job referrals "are not a function of union membership since referrals are available to non-members as well as to members" (*ibid.*). The court concluded that discrimination in job referrals therefore could not be characterized as "discipline" within the meaning of the LMRDA. *Ibid.*



## SUMMARY OF ARGUMENT

I. Decisions of this Court recognize a general rule that courts may not assume jurisdiction over claims based on activity that is arguably protected or prohibited by Sections 7 and 8 of the NLRA. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). However, this general rule is subject to exceptions, two of which are in issue in this case: Even if the conduct involved might also be characterized as an unfair labor practice, this Court's decisions establish that courts are not prohibited from entertaining a claim that a union has (1) breached its duty of fair representation or (2) violated the LMRDA. *E.g.*, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). In this case, petitioner's amended complaint states colorable claims falling within each of these exceptions. The district court was therefore not precluded by *Garmon* and its progeny from adjudicating the merits of those claims.

II. The court of appeals also erred when it held, relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), that if a job referral system is open to both members and non-members of a union, discrimination by the union in the administration of the system cannot constitute "discipline" for purposes of Sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C. 411(a)(5), 529. In *Finnegan* v. *Leu*, this Court held that a newly elected union president did not "discipline" the union's business agents, within the meaning of Section 609, when he discharged them in order to appoint replacements loyal to him. In that context, the Court drew a distinction between benefits extended to the union's rank-and-file, the withdrawal of which could constitute "discipline" under the Act, and benefits extended only to certain

union officials or employees, the withdrawal of which was held not to be "discipline." That analysis is not dispositive of the question whether the withdrawal of a benefit extended to all members of the rank-and-file falls outside the Act's definition of "discipline" simply because that benefit is also enjoyed by some non-members. The language, purpose, and legislative history of Section 609 support an interpretation of the term "discipline" that would make that section applicable to discrimination in the administration of a job referral system when the discrimination is intended to punish a union member for engaging in protected intra-union political activity.

Even if that type of discrimination were not "discipline," it should be held to "infringe" the complaining union member's rights within the meaning of Section 102 of the LMRDA, 29 U.S.C. 412. Earlier this Term, in *Sheet Metal Workers' International Ass'n* v. *Lynn*, 109 S. Ct. 639, 644 (1989), this Court made clear that whether action taken by a union against one of its members "infringes" the member's rights under the LMRDA within the meaning of Section 102 must be "judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." Discrimination against a union member in a job referral system, in retaliation for the member's engaging in protected intra-union political activity, is inimical to that "basic objective," whether or not participation in the system is limited to members of the union.



## ARGUMENT

### I. THE DISTRICT COURT HAD JURISDICTION OVER PETITIONER'S CLAIMS THAT THE UNION BREACHED ITS DUTY OF FAIR REPRESENTATION AND VIOLATED THE LMRDA

In the NLRA, "Congress * * * entrusted administration of the labor policy for the Nation" to the NLRB, "a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242. To ensure the integrity of that scheme, the Court has recognized a general rule that the Board has exclusive jurisdiction of activity "arguably subject" to the Act (*id.* at 245):

> When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *.

The Court has reaffirmed that general rule on many occasions.[2]

As both lower courts found, petitioner's fair representation and LMRDA claims fall within the scope of *Garmon*'s general rule. Petitioner has alleged that the Union denied him referrals because of his intra-union political activity. Such discriminatory conduct would at least arguably violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), which prohibits a union both from restraining or coercing employees in the exercise of their rights to

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[2] *E.g.*, *Local 100, United Ass'n* v. *Borden*, 373 U.S. 690, 697 (1963); *Iron Workers* v. *Perko*, 373 U.S. 701, 705 (1963); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 302 (1971); *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 305 (1977).

engage in union activity and from breaching its duty of fair representation.[3]

However, *Garmon*'s general rule is not absolute. Courts may entertain certain categories of cases as to which "it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca* v. *Sipes*, 386 U.S. 171, 179 (1967). See *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 296-297 (1977). The causes of action set forth in petitioner's complaint—which are based on alleged breaches of the Union's duty of fair representation and alleged violations of petitioner's right to free speech under the LMRDA—are among those that a court may properly adjudicate.

### A. *The Fair Representation Claim*

In *Vaca* v. *Sipes*, 386 U.S. at 188, the Court held that a state court had jurisdiction over a claim that a union had breached its duty of fair representation by failing to exhaust contractual grievance procedures on behalf of an employee who had been discharged. The Court explained (*ibid.*):

> [T]he unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the *Garmon* pre-emption doctrine inapplicable.

[3] *Local 100, United Ass'n of Journeymen* v. *Borden*, 373 U.S. 690, 697 (1963). See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954) (NLRA designed "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (assuming breach of duty of fair representation is arguably subject to the NLRA); pp. 13-15, *infra*.



In view of the origins and development of the fair representation doctrine, the rationale of *Vaca* v. *Sipes* extends to all substantial fair representation claims. Because petitioner's fair representation claim was substantial, the district court had jurisdiction to adjudicate it on the merits.

1. The decision in *Vaca* v. *Sipes* rested on three basic considerations:

First, the Court found that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation." 386 U.S. at 180-181. The Court explained that courts had developed and elaborated the fair representation doctrine before the Board acquired statutory jurisdiction over union activities and before the Board first ruled that breaches of the duty of fair representation were unfair labor practices. *Id.* at 181. Moreover, when the Board decided that it would characterize breaches of that duty as unfair labor practices, it "adopted and applied the doctrine as it had been developed by the federal courts." *Ibid.* Indeed, fair representation cases often involve matters "not normally within the Board's unfair labor practice jurisdiction," giving rise to some doubt as to whether "the Board brings substantially greater expertise to bear on these problems than do the courts" (*ibid.*).

Second, the Court found that the duty of fair representation was a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (386 U.S. at 182). Noting that the Board's General Counsel has unreviewable discretion to refuse to institute unfair labor practice proceedings, the Court was unwilling to assume that Congress intended to deny employees their traditional judicial

remedy for a breach of the duty of fair representation. *Id.* at 183.

Finally, the Court cited "intensely practical considerations" in support of its conclusion that fair representation claims were not preempted (386 U.S. at 183). Claims that a union had breached its duty of fair representation would often arise in employees' suits to enforce collective bargaining agreements under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), so that it would be anomalous and unwieldy to preclude courts from adjudicating fair representation issues in such actions. *Id.* at 183-187.

To be sure, petitioner's complaint does not allege that the union's actions have occurred in the context of a breach of contract, and therefore the last of these considerations may be inapplicable to the fair representation claim in this case. Nevertheless, in view of the undoubted applicability to this case of the other grounds for the holding in *Vaca* v. *Sipes*, the origins of the fair representation doctrine, and decisions after *Vaca* v. *Sipes*, it is clear that this feature of petitioner's fair representation claim does not justify a decision that it is preempted.

From its inception, the fair representation doctrine has not been limited to situations in which a union's failure adequately to represent the members of a bargaining unit results in a breach of a collective agreement. This Court first recognized the doctrine in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944), a case in which the union breached its duty to certain members of the bargaining unit by negotiating an agreement that discriminated against them. In that case, therefore, it was *enforcement* of the terms of an agreement, not a breach, that injured the employees. Consistent with the scope of the union's role as an exclusive representative of the members of a



bargaining unit, the duty of fair representation is now understood to extend to the negotiation, administration, and enforcement of collective agreements. *Communications Workers of America* v. *Beck*, 108 S. Ct. 2641, 2645 (1988).[4]

In decisions since *Vaca* v. *Sipes*, this Court has made clear that the exception to the *Garmon* rule for fair representation claims is as broad as the fair representation doctrine itself. In *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299 (1971), the Court observed, "[A]n action seeking damages for injury inflicted by a breach of a union's duty of fair representation [is] judicially cognizable in any event, that is, even if the conduct complained of [is] arguably protected or prohibited by the National Labor Relations Act and *whether or not the lawsuit [is] bottomed on a collective agreement*" (emphasis added). Similarly, in *Communications Workers of America* v. *Beck*, *supra*, this Court decided a fair representation claim on its merits

[4] The court of appeals erred, therefore, when it stated that an employee must "affirmatively allege that his *employer* breached the collective bargaining agreement" to state a claim for breach of a union's duty of fair representation. See Pet. App. A2. *Bagsby* v. *Lewis Brothers, Inc.*, 820 F.2d 799 (6th Cir. 1987), upon which the court relied, does not suggest otherwise. In that action, the plaintiff sought relief in court for a breach of a collective bargaining agreement without first exhausting contractual grievance procedures. When, as in that case, an employee seeks relief for a breach of a collective bargaining agreement and that agreement establishes a grievance procedure covering the relevant dispute, the employee concededly cannot prevail without demonstrating both that the union has breached the duty of fair representation in handling his grievance and that the employer has breached the collective bargaining agreement. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976); *Clayton* v. *Automobile Workers*, 451 U.S. 679, 681, 685-687 (1981). A showing of employer breach is not necessary, however, where the relief an employee is seeking is not dependent on a breach of contract.

even though no allegation of employer breach was or could have been made.[5] In keeping with these decisions, the courts of appeals, including the Sixth Circuit, have agreed that *Vaca* "establishes a broad immunity from preemption for all fair representation suits," not just cases that arise in connection with an alleged breach of a collective bargaining agreement.[6]

[5] Contrary to the court of appeals' suggestion (Pet. App. 2), *Local 100, Journeymen* v. *Borden, supra,* does not support a different view. *Borden* held only that the NLRA preempted the application of *state* law to a claim arising from discrimination in job referrals. Even though fair representation claims based on *federal* law can involve conduct that is arguably subject to the NLRA, those claims may nevertheless be judicially vindicated because "the *particular rule of law* sought to be invoked * * * is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Lockridge,* 403 U.S. at 297-298 (emphasis added). There is thus no inconsistency between *Borden's* holding that state law claims arising from conduct arguably subject to the NLRA are preempted and a decision that federal fair representation claims involving the same conduct are not. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 635-637 (1975).

[6] *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union,* 750 F.2d 1368, 1376 (7th Cir. 1984). Accord, *e.g., Storey* v. *Local 27, International Brotherhood of Teamsters,* 759 F.2d 517, 523 (6th Cir. 1985); *Beriault* v. *Local 40, Super Cargoes & Checkers,* 501 F.2d 258, 264-266 (9th Cir. 1974); *Smith* v. *Local No. 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d 741, 748-749 (5th Cir. 1974).

To our knowledge, no court in any case other than this one has held that a fair representation claim is preempted by the NLRA. The court of appeals erred in suggesting that *Journeymen Pipe Fitters Local 392* v. *NLRB,* 712 F.2d 225 (6th Cir. 1983), and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.,* 779 F.2d 497 (9th Cir. 1985), aff'd, 484 U.S. 539 (1988), were such cases. See Pet. App. A2. Indeed, in the former case, the court observed that "[u]nder current law, an employee who has not been fairly represented may seek relief in more than one forum * * *." 712 F.2d at 228. *Laborers Health & Welfare Trust Fund* did not address the issue.



2. As the Court cautioned in *Beck*, 108 S. Ct. at 2647, "employees * * * may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." See also *Lockridge,* 403 U.S. at 301. That concern is met, however, when an employee's fair representation claim is colorable or substantial.[7] Petitioner's complaint satisfies that test. It states a fair representation claim of sufficient substance to confer jurisdiction on the district court and empower it to proceed to the merits.

When a collective bargaining agreement establishes a job referral system to provide employment to members of the bargaining unit, a union's operation of that system is part of the "administration" of the collective bargaining agreement and thus arguably falls within the scope of the union's duty of fair representation. *Beck,* 108 S. Ct. at 2645. The Board and several courts of appeals have held that a union breaches its duty to the members of a bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an *exclusive* hiring hall or referral system. *Smith* v. *Local 25,* 500 F.2d 748-749; *Beriault* v. *Local 40,* 501 F.2d at 264-266; *Lewis* v. *Local 100, Laborers,* 750 F.2d at 1376; *Operating Engineers, Local 406 (Ford, Bacon & Davis),* 262 N.L.R.B. 50, 51, 57 (1982), enforced, 701 F.2d 504, 508-509 (5th Cir. 1983); *Pipefitters Local 392 (Kaiser Engineers),* 252 N.L.R.B. 417, 421-422 (1980); *Cell-Crete Corp.,* 288 N.L.R.B. No.

[7] Cf. *Hagans* v. *Lavine,* 415 U.S. 528, 536-540 (1974) (federal courts have subject matter jurisdiction over constitutional claims that are "substantial"); *Bell* v. *Hood,* 327 U.S. 678 (1946) (distinguishing claims that are so insubstantial as to fail to create jurisdiction from those that are subject to dismissal on the merits for failure to state a claim).

32 (Mar. 29, 1988).[8] The Board has explained that "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment that violates the union's duty of fair representation—absent a showing that "the action was necessary for the effective performance of [the union's] function of representing its constituency." *Operating Engineers Local 406*, 262 N.L.R.B. at 57.

The district court found that this case involves a non-exclusive referral system, since employers were free to hire—and sheet metal workers to seek employment—outside the system. See Pet. App. A5. The Board has not yet ruled directly on whether discrimination in a non-exclusive referral system is a breach of the duty of fair representation.[9] However, at least a colorable argument can be made that, when a union that is the employees' exclusive representative undertakes to establish an optional referral system for the employees pursuant to the terms of a collec-

[8] A referral system is "exclusive" if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time, such as 24 or 48 hours, or to a specified percentage of the work force. *Carpenters Local 608 (Various Employers)*, 279 N.L.R.B. 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2d Cir.), cert. denied, 108 S. Ct. 72 (1987). If employers are not required, for any period or as to any part of their work force, to hire through the referral system, the system is "non-exclusive."

[9] See *Carpenters Local 608*, 279 N.L.R.B. at 747 n.1 (finding an exclusive system, and thus declining to rely on an ALJ's conclusion that the duty of fair representation attaches to administration of a nonexclusive system). See also *Bricklayers' Local 8*, 235 N.L.R.B. 1001, 1007 (1978); *Carpenters Local 1016 (Bertram Constr.)*, 272 N.L.R.B. 539 (1984).



tive bargaining agreement, its duty of fair representation extends to the operation of that system. See *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (union's duty of fair representation is "equal in scope to its authority" as exclusive bargaining representative). Because the courts below dismissed on jurisdictional grounds, they gave no consideration to the merits of this theory. Accordingly, the judgment of the court of appeals should be reversed with respect to the fair representation claim and the case should be remanded for further proceedings on the merits.

### B. *The LMRDA Claim*

The court of appeals also erred in holding that petitioner's LMRDA claim was preempted by the NLRA.[10] This Court has held that *Garmon*'s general rule of preemption does not apply to actions under the LMRDA. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971).

In *Hardeman*, a union member alleged that he had been expelled from the union in violation of Section 101(a)(5) of the Act, 29 U.S.C. 411(a)(5). The union argued that because the "gravamen" of the suit was a contention that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction. 401 U.S. at 237; see also *id.* at 239. This Court disagreed with the union's characterization of the member's claim, finding that the "critical issue" raised by his claim was whether the union's disciplinary procedures complied with the LMRDA. *Id.* at 237-238. Moreover, the Court continued,

[10] Although the court of appeals' opinion is not entirely clear, we read it as dismissing petitioner's LMRDA claim on two alternative grounds: (1) preemption and (2) the absence of a showing of "discipline" within the meaning of the Act. See Pet. App. A2-A3.

Hardeman's LMRDA claim "implicate[d] none of the principles" recognized in the court's earlier preemption decisions. *Id.* at 240. Because Congress gave union members an express right to recover damages for violations of the LMRDA, Hardeman's claim was held to be "within the competence of the District Court." *Id.* at 241. The courts of appeals have also uniformly concluded that LMRDA claims are not preempted by the exclusive jurisdiction of the Board.[11]

The court of appeals cited *Hardeman* (Pet. App. A2), but did not attempt to reconcile that decision with its disposition of petitioner's LMRDA claim. Since there is no apparent basis for distinguishing this case from *Hardeman*, the court of appeals' determination that the LMRDA claim is preempted should be reversed.

## II. PETITIONER'S COMPLAINT STATES A CLAIM UNDER THE LMRDA

Petitioner's amended complaint alleged (Pet. App. A21):

> Plaintiff's discriminatory treatment in job referrals • • • has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. [411(a)(5)] and 29 U.S.C. 529.

The court of appeals held that this allegation was insufficient as a matter of law, in the context of the job referral system in this case, because petitioner "did not demonstrate that he was improperly 'disciplined,' a crucial

[11] *Schmid* v. *United Brotherhood of Carpenters*, 773 F.2d 993, 995 (8th Cir. 1985); *Quinn* v. *DiGiulian*, 739 F.2d 637, 642-644 (D.C. Cir. 1984); *Vandeventer* v. *Local Union No. 513 of the International Union of Operating Engineers*, 579 F.2d 1373, 1377-1378 (8th Cir. 1978), cert. denied, 439 U.S. 984 (1978); *Keene* v. *International Union of Operating Engineers, Local 624*, 569 F.2d 1375, 1379 (5th Cir. 1978).



element to a LMRDA claim." Pet. App. A3. Relying principally on *Finnegan* v. *Leu*, *supra*, the court explained that the LMRDA "is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment." *Ibid.* In our view, this interpretation of the Act misconceives the decision in *Finnegan* v. *Leu* and improperly limits the protection that the LMRDA provides to the rank-and-file members of a union.

Section 101(a) of the LMRDA, 29 U.S.C. 411(a), establishes a "bill of rights" for union members. Subject to an exception not applicable here, subsection (2) of this provision confers on a union member the right to free speech, i.e., "to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting." The Act gives a union member two overlapping remedies for actions by a union that tend to restrain or punish the exercise of these rights. First, under Section 102, 29 U.S.C. 412, a person whose rights "have been infringed" by a violation of Section 101(a) may seek relief in a federal district court. Second, Section 609, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under [Section 101, among others]." A violation of Section 609 is also actionable under Section 102.[12]

[12] See *Finnegan* v. *Leu*, 456 U.S. at 439-440 & n.10 (discussing the degree of overlap between Sections 102 and 609 and the sequence of events in Congress that resulted in the passage of these remedies).

In addition to protecting union members from retaliation for protected political activity, the LMRDA, in Section 101(a)(5), also guarantees a member procedural due process before he is "fined,

1. Petitioner's principal claim appears to be that he was "disciplined" by the Union—through discrimination in job referrals—for engaging in political activity that is protected by the LMRDA's bill of rights. At this juncture, this case presents only the question whether that claim was properly dismissed on the basis of a finding that the job referral system was open to non-members as well as to members of the union. The court of appeals erred, we believe, in its conclusion that *Finnegan* v. *Leu, supra,* requires that result. Moreover, the court's interpretation finds no support in the language, purpose, or legislative history of the Act.

In *Finnegan,* a newly elected president of a local union discharged the local's business agents and appointed replacements loyal to him. The agents who had been discharged brought an action under the LMRDA, alleging that they had been "otherwise disciplined," in violation of Section 609, for their political support of the former president. This Court affirmed the dismissal of the complaint, holding that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609." 456 U.S. at 439.[13] The Court ex-

suspended, expelled, or otherwise disciplined" by a union for any reason. 29 U.S.C. 411(a)(5). In the text, we focus upon Section 609 of the Act, which is worded in very similar terms. Our analysis of the actions that may constitute "discipline" for purposes of Section 609 is generally applicable to Section 101(a)(5) as well. See 456 U.S. at 438-439 n.9. However, we understand the principal focus of the complaint to be on alleged retaliation for political activity, rather than procedural due process.

[13] The Court also held that the discharges could not be challenged by alleging an "infringement" of the agents' rights within the meaning of Section 102 of the Act, since those rights were not intended to "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." 456 U.S. at 441. We address below the applicability of Section 102 to this case. See pp. 24-26, *infra.*



plained that, for purposes of Section 609, the term "discipline" "refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union." *Id.* at 437.

The court of appeals understood this language to foreclose application of the LMRDA to the job referral program at issue in this case, because it found that the program was not limited to union members and thus, in a sense, was not a right that members of the union possessed as such. However, in *Finnegan*, this Court emphasized the Act's protection of rights enjoyed by union members in order to highlight the distinction between benefits enjoyed only by a subgroup of the union's members—members who also were policymaking employees of the union—and benefits extended to the union's rank-and-file. Indeed, the Court prefaced its analysis of Section 609 with the observation that "it is readily apparent, both from the language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect." 456 U.S. at 437. The Court found that the withdrawal of a benefit provided only to union employees and officers was different in kind from the types of disciplinary actions specified in the statute—fines, suspensions and expulsions—and thus could not be deemed to fall within the residual category of sanctions to which Section 609 applies. 456 U.S. at 437-438.

The question presented by this case is far different. Here, participation in the Union's job referral program is a benefit enjoyed by all members of the Union within the bargaining unit, and the issue is whether withdrawal of the benefit can be deemed "discipline" even though that benefit may also be extended to non-members of the

Union. *Finnegan*'s emphasis on the distinction between union members and union leaders does not apply to this situation. In fact, the court of appeals' reliance on language in *Finnegan* that drew that distinction turns the Court's approach on its head. *Finnegan*'s conclusion that the Act did not protect the positions and perquisites enjoyed only by union leaders was surely not intended to narrow the class of benefits, enjoyed by the rank-and-file, that cannot be withdrawn in retaliation for the exercise of protected rights.

The court of appeals implicitly acknowledged (see Pet. App. A3) that participation in a job referral system limited to union members would be a part of "a union member's rights or status *as a member of the union*" (456 U.S. at 437). The fact that non-members may be included within the system should not alter that characterization.[14] In either case, when a union member's removal from or demotion on an out-of-work list is based upon a violation of a union rule or policy, or political opposition to the union's leadership, the removal or demotion can fairly be characterized as a punitive action taken against the member *as a member* that sets him apart from other members of the rank-and-file. See *id.* at 437-438. Moreover, such an action bears enough similarity to the specific disciplinary actions referred to in Section 609 to fall within the residual category of sanctions—encompassed by the phrase "otherwise disciplined"—that are subject to that provision.

Any other interpretation of that phrase would be anomalous and inconsistent with the Act's purposes. We

[14] See *Moore* v. *International Brotherhood of Electrical Workers Local 569*, 653 F. Supp. 767, 770 (S.D. Cal. 1987) ("It simply does not follow that a given action [discrimination in hiring off an out-of-work list] does not affect a member's rights or status simply because non-members may belong to the list.").



can perceive no reason why Congress could have intended to prohibit a union from expelling a member of the rank-and-file from a members-only hiring hall for his political opposition to a union's leadership, but to permit the union to impose the same sanction for the same reason if the hiring hall includes some non-members. The language of the statute provides no support for such a distinction. Moreover, in *Finnegan*, 456 U.S. at 435-436, this Court noted that the LMRDA "placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." If Congress was concerned about union discipline that could lead indirectly to "loss of livelihood," it is unlikely that it would have exempted retaliation effected through union job referral systems from the Act, whether or not they include non-members, since that type of retaliation affects livelihood directly.[15]

The court of appeals decision most nearly on point is consistent with our interpretation of the phrase "otherwise

[15] See *Vandeventer* v. *Local Union No. 513, Int'l Union of Operationg Engineers*, 579 F.2d 1373, 1378-1379 (8th Cir. 1978).

Commentators have differed on the extent to which union actions reducing a member's employment opportunities constitute discipline for purposes of the Act. Compare Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L. Rev. 727, 732-735 (1969) (such actions constitute discipline when "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union"), and Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 Ga. L. Rev. 383, 392 (1975) ("The idea that 'discipline' includes only union action which affects membership status is unnecessarily narrow."), with Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference With Employment Opportunities*, 114 U. Pa. L. Rev. 700, 702 (1966) ("interference with employment opportunities should be excluded from the scope of section 101(a)(5)").

disciplined." In *Murphy* v. *International Union of Operating Engineers, Local 18,* 774 F.2d 114 (1985), cert. denied, 475 U.S. 1017 (1986), another panel of the Sixth Circuit held that a union's refusal to register a member's card in a union-operated job referral system, based upon the member's alleged theft of an election control list, was "discipline" for purposes of Section 101(a)(5) of the LMRDA. Rejecting the claim that this action was "employment-related" and thus exempt from the LMRDA under the reasoning of *Finnegan* v. *Leu*, the court explained (456 U.S. at 123-124):

> The Union's action in foreclosing Murphy's participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. Judge Lambros correctly held that the removal of the card was discipline impermissibly imposed without a full and fair hearing.[16]

See also *Keene* v. *International Union of Operating Engineers, Local 624,* 569 F.2d at 1379-1380.

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[16] The court did not disturb a ruling by the district court that discrimination in the operation of a work referral system that fell short of completely foreclosing a union member's employment opportunities was not "discipline" for purposes of the Act. 774 F.2d at 122. However, it appears from the court's opinion that that ruling was not challenged on appeal and, because the court affirmed a determination that the discrimination was actionable under Section 102 of the Act in any event (774 F.2d at 122-123), the possibility that the existence of "discipline" might depend on the severity of the member's mistreatment does not appear to have been relevant to the disposition of the case.

Two other courts of appeals have held that a union's suspension of a member from a job referral system because the member had violated the terms of a collective bargaining agreement did not constitute "discipline" for purposes of Section 101(a)(5) of the Act. *Turner* v. *Local Lodge No. 455 International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985) (observing illegal picket line); *Hackenburg* v. *International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (wildcat strike). Both courts held that, under the reasoning of *Finnegan* v. *Leu*, the enforcement of a collective bargaining agreement did not affect a union member's rights or status as a member of the union and did not implicate the purposes of the LMRDA. 755 F.2d at 869-870; 694 F.2d at 1239. We disagree with the reasoning of these cases to the extent they suggest that union actions depriving members of the rank-and-file of employment opportunities can never constitute "discipline." However, the critical circumstance on which both courts relied—the fact that union members were suspended from the job referral systems because they had violated collective bargaining agreements, rather than union rules or policies—is not present in this case. The question whether Congress intended union members to receive due process under the LMRDA in that situation therefore need not be addressed.



Concededly, not every action by a union adverse to a member can be characterized as "discipline." However, at a minimum, that term includes an action whose purpose or predictable effect is to punish or deter the exercise of rights protected by the Act.[17] In this case, the complaint alleged that actions taken by the Union against petitioner were "part of widespread, improper discipline for political opposition." Pet. App. A21. Liberally construed, that allegation states a potential claim under Section 609 of the

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[17] Similarly, in *Miller* v. *Holden*, 535 F.2d 912, 914-915 (1976), the Fifth Circuit applied the maxim of *ejusdem generis* to the phrase "fined, suspended, expelled, or otherwise disciplined" in Sections 101(a)(5) and 609 of the Act and concluded that an action affecting a member's employment could constitute "discipline" when (535 F.2d at 915):

> (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership, and (2) it directly penalizes him in a way which separates him from comparable members in good standing.

LMRDA. Because the court of appeals erred in its conclusion that discrimination in a job referral system open to non-members of a union can *never* constitute "discipline," its judgment must be vacated with respect to this issue and the case remanded for further proceedings.

2. When a union acts against one of its members in retaliation for his exercise of protected rights, Section 102 of the Act, 29 U.S.C. 412, may also provide a basis for relief. As noted above, Section 102 applies to actions that "infringe" rights protected by Title I of the Act, whether or not the action can also be characterized as "discipline." In *Sheet Metal Workers* v. *Lynn, supra,* this Court clarified the test by which courts may determine what actions infringe the right to free speech protected by Title I of the LMRDA. In that case, an elected union official had been removed from office because he opposed a dues increase proposed by a union trustee. The Court held that this action infringed the official's right to free speech. Finding that the official's dismissal forced him to pay a price for engaging in protected speech, the Court said that the determination whether that "interference" gave rise to a cause of action under Section 102 (109 S. Ct. at 644 (quoting *Finnegan* v. *Leu*, 456 U.S. at 441)):

> must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."[18]

[18] This "basic objective" was gleaned from the legislative history of the LMRDA, history that was reviewed in some detail in *United Steelworkers of America* v. *Sadlowski*, 457 U.S. 102, 109-111 (1982). See also *Finnegan* v. *Leu*, 456 U.S. at 435-436.



The Court also specifically rejected the argument that the union official's rights were not infringed because, although he had lost his job, he retained all of the rights available to union members generally. 109 S. Ct. at 644.

Under this analysis, it is clear that if discrimination against a union member in the operation of a job referral system is based on political activity protected by Section 101(a)(2), such discrimination would infringe the member's rights under that section and give rise to a cause of action under Section 102. A union member who is deprived of employment in retaliation for political activity has "paid a price for the exercise of his membership rights." *Sheet Metal Workers* v. *Lynn*, 109 S. Ct. at 644. That type of interference could not conceivably advance the Act's "basic objective" of fostering democratic government of unions.[19] Moreover, none of the considerations supporting this Court's determination in *Finnegan* v. *Leu*—that discharges from appointed policymaking posi-

[19] *Finnegan* v. *Leu* does not suggest otherwise. As the Court explained in *Lynn*, while an elected union president's discharge of officials appointed by his predecessor did have "some chilling effect" on their free speech rights, it also tended to "vindicate the democratic choice made by the union electorate." 109 S. Ct. at 644. Retribution against the rank-and-file in job referrals has no comparable justification. It is not conceivably "an integral part of ensuring a union administration's responsiveness to the mandate of the union's election." *Finnegan* v. *Leu*, 456 U.S. at 441.

Indeed, in *Finnegan*, 456 U.S. at 441 n.11, the Court reserved the question whether Section 102 would apply to discharges of "non-policymaking and nonconfidential employees." The Court could not have meant to suggest that interference with the outside employment opportunities of union rank-and-file was permitted while at the same time preserving the possibility that the jobs of some types of the union's own employees would be protected by the Act.

tions in a union are exempt from the LMRDA—applies to such a case. See 456 U.S. at 441-442.

Fairly construed, the amended complaint, which cited Section 102 and which alleged facts that could give rise to an action under that Section, could be understood to encompass a claim that the Union "infringed" petitioner's rights under Title I of the Act. We take no position on whether that claim has been properly preserved in the lower courts.[20] But we believe the court of appeals erred to the extent it suggested that proof of unlawful "discipline" is a "crucial element" of any LMRDA claim and that the "LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment" (Pet. App. A3).

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[20] We note also that the last question presented in the petition (Pet. i), which focuses on the issue of "discipline," may not encompass the issue of whether the Union "infringed" petitioner's rights within the meaning of Section 102.



## CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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